

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTSFILED
CLERK'S OFFICE
FEB 20 P 12:07DISTRICT COURT
DISTRICT OF MASS.

JOSEPH LEDOUX, SR.,

Petitioner,

v.

KATHLEEN M. DENNEHY, et al.

Respondents.

Civil Action No. 04-10116-WGY

**MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENTS' MOTION TO DISMISS PETITION
FOR WRIT OF HABEAS CORPUS AS TIME-BARRED**

The respondents, Kathleen M. Dennehy, Commissioner of Corrections, and Lois E. Robinson, Superintendent (hereinafter, collectively, "the respondents"), respectfully submit this memorandum in support of their motion to dismiss the petition for writ of habeas corpus filed by the petitioner, Joseph LeDoux, Sr. The application for a writ of habeas corpus must be dismissed because, as detailed more fully below, it is time-barred under 28 U.S.C. §224(d), the statute of limitations for federal habeas corpus petitions, which is contained in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Because the petitioner's conviction became final in 1995, more than a year before the passage of AEDPA, the petitioner was required to file his petition within a one-year grace period that expired on April 24, 1997.¹ However, the petition was not filed in this Court until January 20, 1994, more than six and one-half (6½) years after the grace period expired. Accordingly, the petition must be dismissed as time-barred.

¹ As is set forth in greater detail in the "Argument" section below, the petitioner's 1996 filing of a motion to revise and revoke his sentence pursuant to Mass. R. Crim. P. 29 does not toll the running of the statute of limitations in this matter.

Prior Proceedings

On November 22, 1994, the petitioner entered a plea of guilty to multiple counts of armed robbery and one count of armed assault of intent to rob.² *See* Docket Sheet for Middlesex County Superior Court Criminal Action 1994-00995 (hereinafter, “Docket Sheet”), attached hereto as Exhibit A. On December 2, 1994, the petitioner filed a motion to revise and revoke his sentence and for a new trial, which was denied by the Superior Court on that same day. *See id.* The petitioner did not appeal the denial of this motion. *Id.*

On August 27, 1996, the petitioner made a new motion to revise and revoke his sentence.³ *See* Docket Sheet, Exhibit A hereto. This motion was apparently denied by the court, and in January 2000 the petitioner moved for reconsideration of the denial of the motion to revise and revoke his sentence. *See id.* The motion for reconsideration was denied on March 7, 2000.⁴ *See id.*

² The petitioner was also charged with being a habitual criminal, but the Commonwealth filed a motion for Nolle Prosequi on this charge. *See* Docket Sheet for Middlesex County Superior Court Criminal Action 1994-00995, attached hereto as Exhibit A.

³ The motion to revise and revoke the petitioner’s sentence was not a motion for a new trial, nor was it a motion to withdraw his guilty plea. *See* Docket Sheet, Exhibit A.

⁴ After the denial of the motion for reconsideration, the defendant made further motions for reconsideration (and for other relief) and filed an appeal. *See* Docket Sheet, Exhibit A hereto. By this time, however, the petitioner’s claim for a writ of habeas corpus had already been time-barred for several years (as is set forth in greater detail in the “Argument” section, *infra*). Accordingly, the remainder of the procedural history is not detailed in this memorandum. Should this Court decline to dismiss this case on statute of limitations grounds, the remaining procedural history will be provided in a subsequent memorandum addressing the respondents’ remaining defenses to the petition.

Argument

A. The Petition Must Be Dismissed as Time-Barred Under the Statute of Limitations for Federal Habeas Corpus Petitions.

The petitioner's request for a writ of habeas corpus must be dismissed under the statute of limitations enacted by Congress as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2244(d), which became effective April 24, 1996. That provision, which is applicable to federal habeas corpus petitions filed by state prisoners, provides that:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) *the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;*

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(emphasis added).

In cases where a petitioner's conviction became final before the effective date of AEDPA (April 24, 1996), the First Circuit has construed § 2244(d) to allow petitioners a one-year "grace period" in which to file a habeas corpus petition. *Gaskins v. Duval*, 183 F.3d 8, 9 (1st Cir. 1999);

Currie v. Matesanz, 281 F.3d 261, 264 (1st Cir. 2002). The one-year grace period began on April 24, 1996, the effective date of AEDPA, and ended on April 24, 1997. *Rogers v. United States*, 180 F.3d 349, 355 (1st Cir. 1999), *cert. denied*, 528 U.S. 1126 (2000). *See also Duncan v. Walker*, 533 U.S. 167, 183-84 (2001)(Stevens, J., concurring)(noting that “Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA’s enactment ...”).

The one-year grace period applies to the petitioner in this case because his conviction became final long before April 24, 1996, the effective date of AEDPA. The Superior Court denied the petitioner’s motion for a new trial on December 2, 1994. *See* Docket Sheet, Exhibit A. Since the petitioner did not take a direct appeal from the denial of this motion, his conviction became final at the expiration of the thirty-day period in which he could have taken an appeal, i.e., on January 2, 1995. *See* 28 U.S.C. § 2244(d)(1)(A). He therefore had until the end of the one year “grace period” -- i.e., until April 24, 1997 -- to file his federal habeas petition. *Gaskins*, 183 F.3d at 9; *Currie*, 281 F.3d at 264.

The federal habeas petition in this case was not filed until January 20, 2004, more than six and one-half years after the one-year grace period elapsed on April 24, 1997. The petition is therefore time-barred under the statute of limitations for habeas petitions and must be dismissed. *See* 28 U.S.C. § 2244(d)(1)(A); *Gaskins*, 183 F.3d at 9; *Currie*, 281 F.3d at 264.

B. The Petitioner’s 1996 Motion to Revise and Revoke His Sentence Under Mass. R. Crim. P. 29 Does Not Toll the Running of the Statute of Limitations

The petitioner may argue that the statute of limitations in the instant case was tolled because he filed a motion to revise and revoke his sentence, pursuant to Mass. R. Crim. P. 29, in

1996.⁵ See Docket Sheet, Exhibit A. However, the filing of a Rule 29 motion does not serve to toll the statute of limitations since it is not “post-conviction or collateral review” within the meaning of AEDPA. See *Bland v. Hall*, 2002 WL 989532 *2 (D. Mass., May 14, 2002)(where motion “does not amount to a collateral attack” on a conviction, it is not a tolling event under 28 U.S.C. § 2244(d)(2))(internal quotations omitted), *aff’d* 2003 WL 182561 (1st Cir., April 8, 2003). See also *Bridges v. Johnson*, 284 F.3d 1201 (11th Cir. 2002)(sentence review application did not stop AEDPA’s clock because it was not a mechanism for reviewing the merits of a conviction); *Walkowiak v. Haines*, 272 F.3d 234, 238 (4th Cir. 2001)(to trigger Section 2244(d)(2), a petitioner must have invoked a procedure that “challenges the legality of the earlier proceeding or judgment”).

AEDPA provides that “[t]he time during which an properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2). In order to constitute such “post-conviction or other collateral review,” the application in question must challenge the underlying conviction and not merely be a plea for leniency in sentencing. See *Walkowiak*, 272 F.3d at 238. Courts which have examined this issue have found that simply asking for a reduction of the sentence imposed, without challenging the legality of the underlying conviction, is not sufficient to constitute “post conviction or other

⁵ While the state court docket sheet does not show the exact date on which the motion to revise and revoke was denied, it must be understood that the motion had been denied by January 2000, when the petitioner filed a motion for reconsideration of the denial of his earlier motion. See Docket Sheet, Exhibit A. For purposes of this motion only, the respondents will assume that the motion to revise and revoke was decided in January 2000.

collateral review” for tolling the statute of limitations.⁶ See *Bridges*, 284 F.3d at 1202-02; *Walkowiak*, 272 F.3d at 236-38. For example, in *Bridges v. Johnson*, 284 F.3d 1201 (11th Cir. 2002), the Eleventh Circuit found that since motions under the Georgia statute permitting review of sentences did not promote the twin aims of exhaustion and finality articulated by the Supreme Court in *Duncan v. Walker*, 522 U.S. 167, 179 (2001), such motions did not toll the statute of limitations for habeas claims pursuant to Section 2244(d)(2). See *Bridges*, 284 F.3d at 1202-04; see also *Duncan v. Walker*, 522 U.S. 167, 179 (2001). Likewise, in *Walkowiak v. Haines*, 272 F.3d 234, 238 (4th Cir. 2001), the Fourth Circuit found that a motion under the West Virginia Rule of Criminal Procedure for “correction or reduction of sentence” did not toll the statute of limitations because it was “neither, properly understood, a proceeding separate and distinct from the proceeding in which the original judgment was rendered, nor even a proceeding in which the legality of the original judgment is attacked.” *Walkowiak*, 272 F.3d at 237.

Under Massachusetts law, the only vehicle for such “post-conviction or other collateral review” is a motion or appeal pursuant to Rule 30 of the Massachusetts Rules of Criminal

⁶ In dicta in the case of *Voravongsa v. Wall*, 349 F.3d 1 (1st Cir. 2003), the First Circuit stated that the petitioner’s post-conviction motion for appointment of counsel did not serve to toll the statute of limitations because it did not “collaterally attack his state conviction or sentence.” 349 F.3d at 6. However, the *Voravongsa* case arose in the context of a review of the Rhode Island Post Conviction Remedy Act, § 10-9.1-1 *et seq.*, which is the exclusive remedy under Rhode Island law for challenging the validity of the conviction or sentence. *Voravongsa*, 349 F.3d at 4-5. The dicta in the *Voravongsa* decision makes no mention of, and has no bearing on, a challenge raised under Massachusetts law, where Massachusetts law provides separate vehicles for challenging a conviction (Rule 30) and for seeking leniency in sentencing (Rule 29). See Mass. R. Crim. P. 29, 30. As is set forth in detail above, only Rule 30 (not Rule 29) provides a vehicle for challenging the conviction which satisfies the requirements for tolling the statute of limitations.

Procedure,⁷ which provides post-conviction relief for persons who are “imprisoned or restrained” in violation of state or federal law. *See* Mass. R. Crim. P. 30; *Stewart, petitioner*, 411 Mass. 566, 568 (1982)(Rule 30 “encompasses all motions for postconviction relief that challenge ‘the sentence, conviction, or confinement imposed’”(internal citations omitted); *In re McCastle*, 401 Mass. 105, 106 (1987)(holding that Rule 30 of the Massachusetts Rules of Criminal Procedure is “the exclusive vehicle for postconviction relief”)(*quoting* *Leaster v. Commonwealth*, 385 Mass. 547, 549 (1982)). *See also, generally*, Kent B. Smith, *Massachusetts Practice*, Vol. 30A, §§ 2021-61 (West 1983 & Supp. 2000). By contrast, a motion pursuant to Rule 29 does not challenge the legality of the underlying criminal conviction or sentence. *See* Kent B. Smith, *Massachusetts Practice*, Vol. 30A, § 2021, *quoting* Reporter’s Notes to Mass. R. Crim. P. 29. Instead, Rule 29 provides a mechanism where by the trial judge may reconsider a concededly lawful sentence to remedy some perceived unfairness. *Id.* *See also* Mass. R. Crim. P. 29, 378 Mass. 899 (1979). Since the petitioner in the instant case had only a motion under Rule 29, and not under Rule 30, pending after 1997, his petition was time-barred as of April 24, 1997, and should now be dismissed. *See Bridges*, 284 F.3d at 1204.

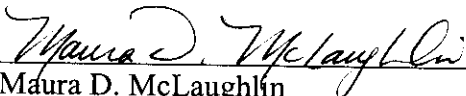
Conclusion

For the foregoing reasons, the respondents respectfully request that this Court dismiss the instant petition for a writ of habeas corpus as time-barred.

⁷ Rule 30 of the Massachusetts Rules of Criminal Procedure is entitled “Post Conviction Relief.” Mass. R. Crim. P. 30.

Respectfully submitted,

THOMAS F. REILLY
ATTORNEY GENERAL


Maura D. McLaughlin
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
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BBO No. 634923

Dated: February 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the petitioner, Joseph LeDoux, Sr., on February 19, 2004, by depositing the copy in the office depository for collection and delivery by first-class mail, postage pre-paid, to him as follows: Joseph LeDoux, Sr., MCI-Plymouth Forestry, P.O. Box 207, South Carver, Massachusetts 02366.

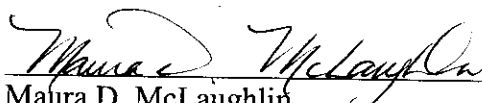

Maura D. McLaughlin

EXHIBIT A

MAS-20030912

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Criminal Docket

02/10/2004

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MICR1994-00995
Commonwealth v Ledoux, Joseph

File Date	06/09/1994	Status	Disposed (appeal denied) (dapden)
Status Date	07/02/2003	Session	2 - Crim 2 (12B Cambridge)
Jury Trial	Unknown	Origin	1 - Indictment
Lead Case			

Trial Deadline	08/03/1995	Deadline Status	Deadline active since return date	Status Date	09/08/1994
Weapon		Custody Status		Start Date	07/12/2001
Arraignment	08/03/1994	Substance		Prior Record	Unknown
		PTC Deadline		Pro Se Defendant No	

OFFENSES				
Num	Offense	Code	Status	Status Date
1	03/07/1994 Robbery, armed	265:017.1	Guilty plea	11/22/1994
2	03/08/1994 Assault, armed, intent to rob	265:018:b.1	Guilty plea	11/22/1994

PARTIES	
Defendant Joseph Ledoux Gender: Male Active 06/09/1994	Private Counsel 110810 Maryellen Cuthbert 2 Shandel Drive Chelmsford, MA 01824 Phone: 978-250-1270 Fax: 978-250-2758 Inactive 01/22/1997 Private Counsel 373600 Stanley W Norkunas 11 Kearney Square Lowell, MA 01852 Phone: 978-454-7465 Fax: 978-937-7753 Withdrawn 02/03/1997 Private Counsel 550135 Jeanne E Earley 79 Merrimack Street Suite 300 Lowell, MA 01852 Phone: 978-970-2255 Withdrawn 01/23/2001

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Plaintiff

Commonwealth
Gender: Unknown
Active 06/09/1994

Private Counsel 559376
Jean C LaRocque
1 Commercial Wharf North
2nd floor
Boston, MA 02110
Phone: 617-523-9777
Fax: 617-523-6116
Active 01/26/2001 Notify

District Atty's Office 544715
Thomas O'Reilly
Assistant District Attorney
151 Warren Street - Suite 100
Lowell, MA 01852
Phone: 978-458-4440
Fax:
Active 08/03/1994 Notify

Private Counsel 647071
Sheryl F Grant
Middlesex County District Atty's Office
40 Thorndike Street
East Cambridge, MA 02141
Phone: 617-679-6555
Fax: 617-225-0871
Active 08/12/2002 Notify

ENTRIES

Date	Paper	Text
06/09/1994	1.0	Indictment returned
06/09/1994		Note:001(8cts) Habitual Criminal Ch279,S25.
08/03/1994	2.0	Appointment of Counsel Cuthbert
08/03/1994		Appearance of Commonwealth's Atty: O'Reilly
08/03/1994		Deft arraigned before Court
08/03/1994		RE offense 1: Plea of not guilty
08/03/1994		RE offense 2: Plea of not guilty
08/03/1994		Bail set: No Bail. Defendant is serving a State Sentence.
08/03/1994		Continued until 09/01/94 for pre-trial conference on all matters.
09/01/1994		Continued until 09/15/94 for pre-trial conference.
09/15/1994		Continued until 10/03/94 for a change of plea by agreement on all matters.
10/03/1994		Continued until 10/13/94 for a change of Plea by agreement on all matters.
10/14/1994		Continued until 10/21/94 for status (defendant not needed) 11/16/94 for trial on all matters.
11/16/1994		Continued until 11/22/94 for trial by agreement on all matters.
11/17/1994	3.0	Habeas corpus for Deft at Shirley MCI
11/22/1994		Plea of not guilty changed to guilty; accepted (Charles J Hely, Justice) Commonwealth moves for sentence.

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Date	Paper	Text
11/22/1994		Sentence imposed: 001 - GENERAL SENTENCE-M.C.I., Cedar Justice for a term not exceeding Twenty Years, or less than Eighteen Years-To Run Concurrent With Any Sentence Now Being Served Including Essex County Matters-To Run Nunc Pro Tunc To 8/3/94 Credit Days-112. Mitts Ussued (Charles J Hely, Justice)
11/22/1994		Sentence imposed: 002-M.C.I., Cedar Junction for a term not exceeding Twenty Years, or less than Eighteen Years. Concurrent with 001. (Charles J Hely, Justice)
11/22/1994		Commonwealth Makes Oral Motion Filing Of A Nolle Prosequi As To 001 Habitual Criminal
11/22/1994		Nolle pros as to 001 Habitual Criminal.
11/22/1994		Notified of right of appeal under Rule 64 to the Appellate Division of the Superior Court.
11/22/1994	4.0	Mittimus returned with service on 001 and 002.
11/29/1994		Attested copy of Indictment mailed to the Superintendent of the Massachusetts Correctional Institution, Cedar Junction.
12/02/1994	5.0	Motion by Deft: To Revise And Revoke Findings And Motion For A New Trial, Filed And Denied Without A Hearing (Charles J Hely, Justice)
08/27/1996	6.0	Pro-Se Motion By Defendant For Revise And Revoke, With Affidavit and Memorandum, Filed in Court
08/27/1996	7.0	Affidavit of Michelle M Tanguay, Filed in Court.
09/17/1996	8.0	Motion by Commonwealth: In Opposition To Defendant's Motion For Revise And Revoke
01/22/1997	9.0	Appointment of Counsel Ncrkunas (Appt. No. 1600636-2)
02/03/1997		Appointment of Counsel Ncrkunas (P#9) Is Hereby Vacated (Charles Hely, Justice)
02/03/1997		Appearance of Deft's Atty: Earley
01/28/2000	10.0	Motion by Deft: For Reconsideration Of Motion to Revise And Revoke With Affidavit And Memorandum (copies sent to Judge Hely)
03/07/2000	11.0	Memorandum of decision and order on motion for reconsideration of motion to revise and revoke Re: The defendants motion for reconsideration of Motion to revise and revoke is Denied (Charles J Hely, Justice)
03/24/2000	12.0	Letter from defendant to (Hely,J) copies sent
03/27/2000		Motion (P#12) This letter is treated as a motion to reconsider, and it is denied (Hely, J.)(notice sent to deft., deft's atty. & A.D.A.
07/17/2000	13.0	Motion by Deft: For Free Transcripts Of Guilty Plea Hearing 11/22/94
07/17/2000		Motion (P#13) allowed (Hely,J)
07/18/2000	14.0	Court Reporter Virginia Karas is hereby notified to prepare one copy of the transcript of the evidence of Nov 22, 1994 Plea before Hely, J. (copy of allowed motion enclosed)
08/17/2000	15.0	Motion by Deft: To Withdraw Guilty Plea and Request For New Trial with Affidavit of Defendant in Support of Motion to Withdraw Guilty Plea and For New Trial and Memorandum in Support of Motion to Withdraw Guilty Plea and Request for New Trial (case sent to Judge)
08/17/2000	16.0	Motion for appointment of counsel with Affidavit of Indigency and

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Date	Paper	Text
	16.0	Request for Waiver, Substitution or State Payment of Fees and Costs (case sent to Judge)
08/24/2000		Motion (P#16) allowed (Charles J. Hely, Justice), copy sent to Atty. Stanley W. Norkunas
01/23/2001	17.0	Appearance of Deft's Atty: Jean C LaRocque
07/26/2001		Motion (P#15) denied, see memorandum (Charles J. Hely, Justice) copy sent to defn, atty & da
07/26/2001	18.0	Memorandum of Decision and Order on Motion to Withdraw Guilty Plea and Request for New Trial .ORDER: The motion to withdraw guilty plea and request for a New Trial is Denied. By the Court, Chrls J Hely, Justice. Copy to deft. Atty and DA(
08/10/2001	19.0	Motion by Deft: To "Reconsider" Motion to Withdraw Guilty Pleas and Request for a New Trial with Memorandum in Support of Defendant's Motion (copy to Judge Hely)
08/15/2001	20.0	Deft files Notice of Appeal of denial of motion to withdraw guilty pleas & request for new trial. copy sent to Justice Hely
08/15/2001	21.0	Motion by Deft: for Free Transcripts of Motion to Withdraw Guilty Plea & Request for New Trial Hearing of 7/23/01. copy sent to Justice Hely
08/15/2001	22.0	Motion by Deft: for a Stay of Execution: Relief Pending Review with Supporting Affidavit. copy sent to Justice Hely
08/16/2001		Motion (P#19) denied (Charles J. Hely, Justice) parties notified
09/05/2001	23.0	Deft files Notice of Appeal on denial of motion to Reconsider motion to withdraw guilty pleas & request for a new trial.
09/06/2001		Court Reporter Elizabeth Tyler is hereby notified to prepare one copy of the transcript of the evidence. (7/23/01-Motion to withdraw guilty plea & request for new trial) (Hely, J.)
10/17/2001		Motion (P#21) A Transcript was ordered on 9-6-01 (Hely,J)
10/17/2001		Motion (P#22) Denied (Hely,J)
02/25/2002	24.0	Two sets. One Volume in each set of the Transcript of Evidence delivered to the office of the Clerk of courts (July 23, 2001 Motions) Elizabeth C Tyler, Court Reporter
02/25/2002	25.0	Notice of assembly of record; two certified copies of docket entries two sets of the Transcript of Evidence and P#23 Notice of Appeal sent to the Clerk of the Appeal Court this day
02/25/2002		Notice of assembly of record;sent to Jean C LaRocque, Esquire & Martha Coakley, District Attorney
02/28/2002		Notice of Entry: In accordance with Massachusetts Rule of Appellate Procedure 10 (a) (3) please note that the above-referenced case was entered in this court on 2-25-02
08/12/2002	26.0	Appearance of Commonwealth's Atty:Sheryl Grant
08/13/2002	27.0	Motion by Deft: Pro Se Motion To Revise And Revoke With Memorandum And Affidavit In Support Of Motion. (Copy to Hely, J.)
08/13/2002	28.0	Motion by Deft: Pro Se For A Writ Of Habeus Corpus AD Testificadum. (Copy to Hely, J.)
09/26/2002	29.0	Commonwealth files Oppos tion to Defendants Motion to Revise and

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Date	Paper	Text
	29.0	Revoke
09/30/2002		Motion (P#27) denied (Charles J. Hely, Justice) Copies mailed
07/02/2003	30.0	Rescript received from Appeals Court;Denial of motions to withdraw pleas of guilty and for a new trial and for reconsideration AFFIRMED